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In The
Supreme Court of the United States

OHIO PYRO, INC. and
WEST SALEM FIREWORKS, INC.,

Petitioners,

v.

OHIO DEPARTMENT OF COMMERCE, DIVISION OF STATE FIRE MARSHAL, SAFETY 4TH FIREWORKS, INC., AND LIBERTY FIREWORKS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. Ohio Pyro, Inc. and West Salem Fireworks, Inc. are wholly owned by B.J. Alan Company. Therefore there is no parent or publicly held company owning 10% or more of Ohio Pyro, Inc. or West Salem Fireworks, Inc. stock.

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INTRODUCTION

Petitioner Ohio Pyro, Inc. ("Ohio Pyro") obtained a permanent state court injunction to stop the Ohio State Fire Marshal from violating a state statute by allowing a rival fireworks company to relocate three of its state fireworks wholesaler licenses. The contemplated transfers were each to counties from which Ohio Pyro draws its customer base. An intermediate appellate court affirmed that injunction. The Ohio Supreme Court reversed, holding that a consent judgment in a prior lawsuit between the rival and the Fire Marshal barred Ohio Pyro's claim even though Ohio Pyro had been denied intervention in the prior suit. This petition seeks review of that reversal because it transcends the limits that the Due Process Clause of the Fourteenth Amendment places on state court estoppel rules.

CITATIONS OF THE OPINIONS & ORDERS IN THE CASE

Ohio Pyro, Inc. v. Ohio Dep't of Commerce, Div. of State Fire Marshal, 115 Ohio St. 3d 375, 875 N.E.2d 550 (Ohio 2007) (App. 1); *Ohio Pyro, Inc. v. Ohio Dep't of Commerce, Div. of State Fire Marshal*, No. CA2005-03-009, 2007 WL 522457 (Fayette County Ct. App. March 6, 2006) (App. 25); and *Ohio Pyro, Inc. v. Ohio Dep't of Commerce, Div. of State Fire Marshal*, No. 2004 142 CVH, slip op. (Fayette County Ct. Com. Pl.

Feb. 1, 2005) (order granting permanent injunction and summary judgment) (App. 38).

JURISDICTION

The Ohio Supreme Court issued a decision in this case October 3, 2007. (App. 1). This court has jurisdiction to review the judgment of the Ohio Supreme Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

U.S. Const. amend. XIV and Ohio Rev. Code §§ 3737.22, 3743.17, and 3743.75 (2001).

STATEMENT OF THE CASE

Ohio Pyro, a subsidiary of B.J. Alan Company, Inc., is a state-licensed fireworks wholesaler that sells fireworks at a facility located in Fayette County, Ohio, doing business under the name "Phantom Fireworks." The State of Ohio, Department of Commerce, Division of State Fire Marshal is charged with administering the statutory regulatory scheme for the state of Ohio's fireworks industry, including the renewal, re-issuance, and transfer of wholesale fireworks licenses. (Ohio Rev. Code § 3737.22(A)(14)). For more than twenty years, the Ohio Revised Code

has prohibited the geographic transfer of wholesale fireworks licenses to locations outside of their current municipalities or townships. (*See* Ohio Rev. Code § 3743.75).

Factual Background

On June 27, 1997, the last day before a new version of the fireworks moratorium went into effect, Safety 4th Fireworks, Inc. ("Safety 4th")[1] faxed a handwritten letter to the Ohio Department of Commerce, Division of State Fire Marshal ("the Fire Marshal") requesting permission to relocate three wholesale fireworks licenses (App. 2) to different counties within the state. In Ohio, fireworks wholesalers operate under annual licenses issued by the Fire Marshal. In order to obtain a license, or to relocate a license already issued, a wholesaler must obtain the consent of the Fire Marshal as well as comply with all relevant statutory requirements. (App. 2).

Because the Ohio legislature had enacted a moratorium in the mid-1980s forbidding geographic transfers except those transfers within the same city or township where the license was previously located, the Fire Marshal denied Safety 4th's request on July 8, 1999. (App. 2). Safety 4th then commenced suit

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[1] The application indicated that Safety 4th was doing business under a number of names, including Liberty Fireworks, Inc. The name "Safety 4th" is used herein to refer to both Safety 4th and Liberty Fireworks.

against the Fire Marshal in the Jefferson County Court of Common Pleas, arguing that a technical "window" existed in the moratorium allowing for the relocation of licenses at the time it faxed its hand-written request to the Fire Marshal. Safety 4th sought a declaratory judgment that it was entitled to relocate its licenses pursuant to its interpretation that the moratorium in effect on June 27, 1997 contained a "window" allowing transfers; a declaratory judgment that the legislation containing the moratorium was unconstitutional for violating the Ohio Constitution's single-subject rule; and a writ of mandamus to compel the Fire Marshal to approve the relocations (App. 3).

Ohio Pyro is Not Allowed to Intervene

Several fireworks companies, including Ohio Pyro, moved in 1999 to intervene in Safety 4th's action on behalf of the Fire Marshal to uphold the relocation restrictions in the fireworks code. (App. 47).

Despite the fact that non-enforcement of the moratorium would affect the value of Ohio Pyro's property, Judge Joseph J. Bruzzese, Jr. found on January 5, 2000, that Ohio Pyro "had demonstrated no interest in this case other than the general interest that all citizens may have to preserve the laws of the state." (App. 48). Further, the judge found, "It's sole claimed interest is to prevent Plaintiff from moving into an area where it can compete with one of

the B.J. Alan Companies but, it does not claim that Plaintiff is actually moving into such a territory. Its alleged interest is so speculative that it cannot be seriously considered." (App. 49). The judge also found that the Fire Marshal could adequately represent Ohio Pyro because it would "vigorously defend the fireworks code as it now stands." (App. 49).

The Fire Marshal Settles with Safety 4th

Less than two years after Judge Bruzzese predicted that the Fire Marshal would vigorously defend the code, the Fire Marshal entered into an agreement to settle the case in contravention of the moratorium and directly adverse to the interests of Ohio Pyro. The Jefferson County Court of Common Pleas filed the parties' settlement in the form of an Agreed Order on June 6, 2001. Dismissing the complaint with prejudice, the order provided, "Defendant will consider Plaintiff's requests for transfer . . . *to any political subdivision in the state of Ohio* as if perfected on June 27, 1997 provided all provisions of the Agreed Order are met and provided that there is compliance with all other applicable rules and regulations . . . If, at the conclusion of such consideration, defendant should find that all conditions and requirements have been met, then the transfer shall be approved and deemed effective as of June 27, 1999." (App. 40-41 (emphasis added)). The agreement also specified a number of conditions Safety 4th was required to meet before approval would be granted, including compliance with safety regulations. Safety

4th then proceeded to purchase real estate in Fayette County, erected a building, and took steps to finalize the transfer, placing Safety 4th in direct geographic competition with Ohio Pyro for the first time. (App. 41-46).

Fayette County Court Enjoins the License Transfer

After being denied an opportunity to intervene in the license transfer proceedings, Ohio Pyro filed a complaint on April 7, 2004, in Fayette County, Ohio, asking for a declaration of rights and an order to enjoin the Fire Marshal from approving the geographic transfer of the Safety 4th fireworks licenses as being contrary to law.[2] The complaint alleged that the Fire

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[2] The 2001 version of the statute, which Ohio Pyro cited in its original Fayette County complaint, left the moratorium in place through December 15, 2005. Prior to 2001, the moratorium was contained in legislation that was never codified in the Ohio Revised Code. (App. 3). The statute has been updated several times to extend the moratorium. Most recently, the Ohio Legislature extended the deadline to 2011. It now provides:

> (A) During the period beginning on June 29, 2001, and ending on December 15, 2011, the state fire marshal shall not do any of the following:
>
> * * *
>
> (3) Except as provided in division (B) of this section, approve the geographic transfer of a license as a manufacturer or wholesaler of fireworks issued under this chapter to any location other than a location for which a license was issued under this chapter immediately prior to June 29, 2001.

(Continued on following page)

Marshal had "agreed to perform acts that are outside his statutory authority" and that "contravene the express intent of the Ohio legislature." (App. 5).

Ohio Pyro sought a declaratory judgment and permanent injunction to protect its property interest created by the moratorium as "the only company that is presently licensed to operate wholesale fireworks showrooms at any location in Fayette County."[3] In its complaint, Ohio Pyro explained that it relied on the moratorium in conducting its business, noting that it would suffer "diminished revenues, reduced profits, and lost market share" if another fireworks wholesaler were allowed to operate in Fayette County. (App. 6).

After taking evidence, the trial court issued a preliminary injunction on May 19, 2004, prohibiting the Fire Marshal from approving the transfer of the three licenses. (App. 38).

Ohio Pyro then moved for summary judgment. The State Fire Marshal and Safety 4th filed motions to dismiss and cross-motions for summary judgment. On February 1, 2005, the Fayette County Court of

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Ohio Revised Code § 3743.75. Section 3473.75(B) allows the Fire Marshal to approve a transfer under section 3743.17(F), but that section only allows a wholesale license to be transferred within the same city or township, not from one county to another

[3] The trial court later granted the motion to intervene of another plaintiff, West Salem Fireworks, Inc. Because the interests of that party are similar to those of Ohio Pyro, we use "Ohio Pyro" to refer to both parties.

Common Pleas granted Ohio Pyro summary judgment and issued a permanent injunction prohibiting the relocation of the three licenses to any location not within the same political subdivision where each license was located. The court also refunded Ohio Pyro's $23,000 posted bond (App. 39). Both Safety 4th and the Fire Marshal appealed, challenging the trial court's decision to hear the case and subsequent grant of a permanent injunction.

The Court of Appeals Upholds the Injunction

Affirming the ruling of the Fayette County Court of Common Pleas, the Ohio Twelfth District Court of Appeals found, "After reviewing the record, we cannot agree with appellant's position that the trial court's assumption of jurisdiction over the actions seeking declaratory judgment and injunctive relief constitutes a collateral attack on the Jefferson County judgment." (App. 29).

The court of appeals found no jurisdictional defect in Ohio Pyro's action. "A review of the record indicates that the instant case presents a real controversy between the parties and is ripe for judicial resolution and has a direct and immediate impact on the parties." (App. 36).

Noting that Ohio Pyro attempted intervention below, the court of appeals understood the long-held principle that Ohio Pyro could not be bound by a decision in a suit from which it had been excluded. The court observed: "It appears that even the Jefferson

County court anticipated, or rather, required other entities to seek their day in court elsewhere." (App. 30).

Like the trial court, the court of appeals held that an injunction was appropriate because Ohio Pyro had established irreparable harm and had no adequate remedy at law, noting Ohio Pyro's lower court testimony that "competition is not unwelcomed, but the 'playing field' is not level when Safety 4th is permitted to relocate three licenses to presumably favorable locations and no one else is permitted by law to do so." (App. 34).

The Fire Marshal and Safety 4th then sought and obtained review by the Ohio Supreme Court.

The Ohio Supreme Court Applies Collateral Estoppel

Despite the rulings of two separate lower courts that Ohio Pyro was entitled to a permanent injunction, the Ohio Supreme Court accepted jurisdiction to consider whether the trial court's decision amounted to an endorsement of an impermissible collateral attack on a different court's previous judgment. (App. 8). Ohio Pyro defended the lower court decisions arguing that binding it to the earlier adjudication would violate its rights under the due process clause of the Fourteenth Amendment. (Brief at 11).

Even though Ohio Pyro was denied intervention in Safety's 4th's original case, the Ohio Supreme

Court found Ohio Pyro's injunction action to be an impermissible collateral attack, reasoning that "by asserting that the Fire Marshal should not be permitted to approve Safety 4th relocation to Fayette County, Ohio Pyro seeks its own relief that directly conflicts with the terms of the Jefferson County judgment." (App. 13).

Using the jurisprudence that limits the rights of the parties to a suit that results in a judgment to attacking the judgment, the Ohio Supreme Court ruled that Ohio Pyro could not challenge the original decree other than for fraud or lack of jurisdiction. While purporting to examine and respect the limitations of binding a nonparty to a judgment, the Ohio Supreme Court incorrectly conflated its collateral attack analysis with an analysis of standing. "Ohio Pyro argues that its action does not involve a 'collateral attack' because it is merely attempting to vindicate its own rights. However, in this case, the economic interests Ohio Pyro seeks to advance are incapable of supporting its efforts to attack the 2001 Jefferson County judgment." The court went on to state, "intervention provided Ohio Pyro with a potential opportunity to interject its interests in the Jefferson County Case, but whether Ohio Pyro successfully asserted those interests at the time is not relevant to its ability to launch the instant collateral attack." (App. 14).

In a strongly worded dissent, Justice O'Donnell found that the court's holding "misapplies the collateral-attack doctrine and sets a bad precedent for future litigants." (App. 20). Citing this Court's due

process jurisprudence including *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Martin v. Wilks*, 490 U.S. 755 (1989), Justice O'Donnell summed up the problem with the majority's reasoning: "The Jefferson County Common Pleas Court Judgment is binding only upon the parties to the suit." (App. 18).

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Directly Conflicts with this Court's Rulings That a Non-Party May Not be Bound to an Adjudication in Which it was Not Adequately Represented

By denying Ohio Pyro the opportunity to litigate the Fire Marshal's decision to transfer the licenses in contravention of Ohio law, the Ohio Supreme Court bound an unrepresented non-party to a prior judgment that severely diminished its constitutionally protected property interest. The Ohio Supreme Court's action directly conflicts with nearly seventy years of this Court's established due process decisions. If left standing, this decision will allow state courts to circumvent this Court's longstanding holding "that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." *Richards v. Jefferson County*, 517 U.S. 793 (1996).

In *Richards*, this Court observed:

> The limits on a state court's power to develop estoppel rules reflect the general consensus in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. This rule is part of our deep-rooted historic tradition that everyone should have his own day in court. (internal quotations and citations omitted).

The *Richards* rule is grounded in this Court's decision in *Hansberry v. Lee,* 311 U.S. 32 (1940). There, the Court held that a decree in an earlier suit could not bind parties in a subsequent suit whose interests had not been adequately represented in the first. Without representation, the Court held, due process is violated. In *Hansberry*, a group of homeowners brought suit to enjoin the breach of a racially restrictive covenant. The defendants, the buyer and seller of a property affected by the covenant, pled and proved at trial that the covenant had never become effective because 95 percent of property owners had not signed the covenant as was required by the covenant itself. *Id.* at 38. The plaintiffs claimed that in a prior suit an Illinois court already had determined based on a stipulation that the covenant had been signed by the required 95 percent and therefore had become effective. Dismissing this argument, this Court held that the defendants before it could not be bound to the prior ruling because they had not been made a party to it and the defendants in that prior suit were not

representing the distinct interests of the defendants in the subsequent suit.

This Court has considered challenges to the *Hansberry* rule repeatedly in cases such as *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313 (1971); and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), but always has always upheld the decision.

Almost 40 years after *Hansberry*, the rule faced one of its most difficult tests in *Martin v. Wilks*, 490 U.S. 755 (1989). In that case, African-American firefighters brought suit claiming that their employer had discriminated against them on the basis of race. The employer settled those claims by entering into a consent decree that included goals for the hiring and promotion of African-American firefighters. White firefighters who were not parties to the prior litigation then filed their own suit claiming discrimination on the basis of race through implementation of the consent decree. The employer and the African-American firefighters defended their settlement arguing that because the white firefighters had been aware that the underlying suit might affect them and chose to pass up an opportunity to intervene, they should not be permitted to later litigate the issues in a new action. *Id.* at 762.

Chief Justice Rehnquist, writing for a five-justice majority, rejected the argument that knowledge of the prior proceeding and a failure to intervene in it could

be used to treat the prior adjudication as foreclosing the rights of the white firefighters. Instead of relying on due process principles, however, Chief Justice Rehnquist relied on the Federal Rules of Civil Procedure to determine the claim. *Id.* at 763-69. Chief Justice Rehnquist, however, expressly recognized that the due process principle recognized in *Hansberry* would provide a constitutional backstop even in the absence of a rule basis to allow the white firefighters claim to proceed. "All agree," he wrote, "that '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Martin,* 490 U.S. at 761 (citing *Hansberry*, 311 U.S. at 40). He noted as well that certain limited exceptions to this rule had been recognized where the non-party's interests were fully protected by procedures such as those employed in probate and bankruptcy proceedings. *Id.* at 40 n.2.

Justice Stevens, writing for four-members of the Court in dissent, criticized the white firefighters for "remain[ing] on the sidelines" (*Id.* at 769), and then only attempting to assert their rights after a consent judgment had been put in place. He argued that they should not be permitted to attack the consent decree unless they could show that it was "collusive, fraudulent or transparently invalid." *Id.* at 787. His reasoning, rejected by the majority, closely resembles the reasoning used by the Ohio Supreme Court in the instant case.

Because *Martin* had been decided as an interpretation of the Federal Rules of Civil Procedure, it left open the possibility that due process principles would not themselves protect those who watched the rights of others being adjudicated. This issue came to the fore in *Richards v. Jefferson County*, 517 U.S. 793 (1996). There, three county taxpayers and the acting director of finance for the city of Birmingham filed a state court action claiming that a county's occupation tax violated both the state and federal constitutions. The Alabama Supreme Court affirmed the trial court's ruling that the tax had been constitutionally imposed. *Id.* at 795. Thereafter, two new taxpayers filed a complaint challenging the same tax that the Alabama Supreme Court had upheld. The new plaintiffs, unlike the taxpayers in the first suit, claimed to represent a class of all nonfederal employees subject to the tax. *Id.* The trial court awarded summary judgment for the defendants based on the prior adjudication, and the Alabama Supreme Court upheld that decision. *Id.* at 796.

Justice Stevens, the dissenter in *Martin*, now wrote for a unanimous Supreme Court that "the State Supreme Court's holding that petitioners are bound by [the prior adjudication] deprived them of the due process guaranteed by the Fourteenth Amendment." *Id.* at 797. Relying on Chief Justice Rehnquist's admonition in *Martin* that the due process principles of *Hansberry* prevent judgments from binding nonparties when their interests are not adequately represented, Justice Stevens explained that plaintiffs

in the first case had not provided adequate representation to the plaintiffs in the second case. He observed that the three county taxpayers in the first suit did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties. *Id.* at 801. Further, he noted that the city's finance director represented the "corporate interests of the city itself" and "did not purport to represent the pecuniary interests of county taxpayers like petitioners." *Id.*

The taxpayers in the second suit in *Richards* did not, however, have notice of the earlier filed action. *Id.* at 799. The *Richards* decision thus left open the possibility that parties who received notice but remained on the sidelines might be bound by the prior adjudication. That issue came to the Court in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999). In that decision, the Court again held that petitioners attacking a tax could not be bound by a judgment to which they were strangers. This Court maintained this holding despite the fact that the second set of plaintiffs were aware of the first action, even sharing one of the same lawyers. Justice Breyer, writing for another unanimous Court, noted that the Alabama trial court had tried to distinguish *Richards* on the theory that the later plaintiffs in that case had no notice of the earlier action. He held however, that notice of the earlier filed action in *South Central Bell Telephone* could not "have led the later plaintiffs to

expect to be precluded, as a matter of res judicata, by the earlier judgment itself, even though they may well have expected that the rule of law announced [in the first case] would bind them in the same way a decided case binds every citizen." *Id.* at 267. Justice Breyer also concluded that the interests of the later plaintiffs could not be regarded as having been adequately represented in the former suit merely by the fact that one of their lawyers also represented a plaintiff in the earlier action. *Id.*

In Safety 4th's action against the Fire Marshal, the Jefferson County trial court predicted when it denied intervention that Ohio Pyro would be "adequately represented by the Ohio Department of Commerce [of which the Fire Marshal is a part] who will vigorously defend the code as it now stands," (App. 40) but it is now clear that no such vigorous defense ever took place. Instead, the Fire Marshal settled the claim in direct contravention to the governing law and Ohio Pyro's interests. The premise that the Fire Marshal adequately could represent Ohio Pyro's interests was plainly wrong in the first instance because the Fire Marshal is charged with *regulating* fireworks sales, not protecting the proprietary interests of fireworks licensees. Whether Ohio Pyro loses the value of its business is, at the very least, not the concern of the Fire Marshal. In fact, if non-enforcement of the moratorium caused Ohio Pyro to go out of business or forced companies to consolidate, the Fire Marshal would have reduced his own regulatory burden.

The Ohio Supreme Court engages in no discussion regarding the sufficiency of the Fire Marshal representing in litigation a company that he is charged with regulating. From the court's holding that Ohio Pyro's actions amounted to an impermissible collateral attack, it appears the Ohio Supreme Court accepted the sufficiency of representation without analysis. This decision is only the latest in a series of cases from both state supreme courts and lower federal courts grappling with the lingering question of exactly what constitutes the "sufficient representation" this Court found to be lacking in *Richards*. 517 U.S. 793, 805. Much of the confusion comes from lower court interpretations of what the *Richards* court meant when it said, "Moreover, although there are clearly constitutional limits on the 'privity' exception, the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Id.* at 798.

Seizing upon this language, both federal courts and state supreme courts have attempted to extend privity analysis from the traditional concept where, "a person [is] so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved," to "include a broader array of relationships which fit under the title of 'virtual representation'." *Adams v. California Dep't of Health Services*, 487 F.3d 684 (9th Cir. 2007), *cert. denied,* No. 07-467, 2007 WL 2945087 (Dec. 10, 2007). The concept of "virtual

representation" originates in probate proceedings, where "it is often necessary to establish a procedure that will bind persons unknown, unascertained, or not yet born." *Tice v. American Airlines*, 162 F.3d 966, 970 (7th Cir. 1998), (quoting 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4457 at 494 (1981)), *cert. denied*, 527 U.S. 1036 (1999). Despite the fact that probate proceedings have built-in procedural safeguards to protect those virtually represented, courts began adopting the concept for use in general litigation preclusion in 1975 when the Fifth Circuit called it a doctrine, holding "under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests to be his virtual representative." *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975), *cert. denied, Metropolitan Dade County, Florida v. Aerojet-General Corp.*, 423 U.S. 908 (1975). Despite often using the same terminology, "circuits vary widely in their approach to the doctrine." *Taylor v. Blakey*, 490 F.3d 965, 971 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3113 (U.S. Sept. 17, 2007) (No. 07-371). However, courts often use the terms adequate representation and virtual representation interchangeably, further confusing the issue. From generally rejecting the doctrine to creating multi-factor tests, courts continue to apply procedural due process in vastly different ways.

Two years after this Court's decision in *Richards*, the Seventh Circuit employed its reasoning to disavow

the doctrine of virtual representation in *Tice*, 162 F.3d at 974. Calling the doctrine "amorphous," the Seventh Circuit found that "in light of the Supreme Court's continuing solicitude for each person's right to pursue her own case, we cannot strain preclusion principles this much." *Id.* The Seventh Circuit predicated preclusion on three factors:

> At a minimum, the issue on which preclusion is sought must be common to both cases, and the claims or defenses of the two allegedly equivalent parties (earlier litigant, present litigant) must be the same. In addition, unless a formal kind of successor interest is involved (e.g., subsequent landowner, successor corporation), there should be some indication not only that the second party was aware that the first litigation was going on and that the earlier litigation would resolve its claims, but also that the second party either had participated or had a legal duty to participate. Finally, of course, the due process rights of absentees that the decisions in *Hansberry*, *Shutts* and *Richards* recognized must be respected.

162 F.3d at 973 (internal citations omitted); *see also In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 333 F.3d 763, 769 (7th Cir, 2003) (calling virtual representation, "a doctrine that we disapproved in *Tice v. American Airlines*"). Like the Seventh Circuit, the highest court in New York has also disavowed the idea of "virtual representation," which it explained as "a non-party may be bound by

the results of a trial where the non-party has sufficient ties to a litigant." *Buechel v. Bain*, 766 N.E. 2d 914, 922 (N.Y. 2001), *cert. denied*, 535 U.S. 1096 (2002).

As a point of contrast, the most recent circuit court to take a position on virtual representation is the D.C. Circuit, which expressed the doctrine in a two-part test. For a party to be considered a virtual representative able to preclude a successive litigant, (1) the two parties must have the same interests and those interests must be adequately represented in the first litigation; and (2) there must be a close relationship between the two, or the new party must have participated substantially in the prior litigation, or engaged in tactical maneuvering to avoid the preclusive effects of the first decision. *Taylor*, 490 at 978 (holding that because party requesting information under the Freedom of Information Act regarding plans and specifications for an F-15 had the identical interests as and was an associate of the first requester, the decision in the first case was res judicata on the second); *see also Adams*, 487 F.3d at 691 (establishing the Ninth Circuit's requirements for virtual representation as (1) identity of interests (2) adequate representation, (3) a close relationship, (4) substantial participation, and (5) tactical maneuvering).

Other circuits appear to disavow the doctrine by phrasing it in the negative. The Fourth Circuit's test requires that virtual representation should not be used as a basis for preclusion when (1) the interests

of the parties and non-parties are separate; (2) the parties to the first action are not accountable to the non-parties; or (3) the court did not at least tacitly approve the representation in the first action. *Klugh v. United States*, 818 F.2d 294 (4th Cir. 1987); *see also Perez v. Volvo Car Corp.*, 247 F.3d 303, 312 (1st Cir. 2001) (holding "the doctrine of virtual representation cannot be used to bar the claim of a person who was not a party to the earlier suit unless that person, at the least, had actual or constructive notice of the earlier suit and, thus, a chance to join it").

A third possibility for the doctrine is a more general formulation. The Second Circuit's test only states that "claim preclusion may bar non parties to earlier litigation when the interests involved are virtually identical to those in later litigation." *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 (2d Cir. 1995). The Supreme Court of New Hampshire takes a similar tack. It defines the concept as a functional relationship where "at a minimum, the interests of the non-party were in fact represented and protected in the prior litigation." *Cook v. Sullivan*, 149 N.H. 774, 829 (N.H. 2003). Interestingly in a case applying the doctrine in 2005, the Second Circuit hinted that the *Richards* case might present problems for the so-called virtual representation doctrine, which it endorses. The court found that it "need not determine whether the Supreme Court's discussion of privity in *Richards* . . . undermines the virtual representation doctrine" because the case would fail under the circuit's general test for virtual representation.

Hoblock v. Albany County Bd. of Elections, 422 F.3d 77, 90 (2d Cir. 2005).

Both federal and state supreme court cases demonstrate that no clear consensus has emerged regarding how courts are to interpret *Richards* in terms of adequate representation. The result in the instant case demonstrates that the lack of a consensus is leading to bizarre and unfair conclusions such as that a state fire marshal may adequately represent the interests of a state-regulated fireworks company that it purports to regulate. Guidance from this Court is required.

II.

The Decision Below Conflicts with this Court's Rulings That a Property Interest Created by State Statute is Protected by Procedural Due Process

In vacating the injunction obtained by Ohio Pyro, the Ohio Supreme Court cast its decision primarily in terms of collateral estoppel, but it also asserted that Ohio Pyro lacked any interest warranting protection, observing:

> The rights Ohio Pyro asserts in its complaint are the right to protect its market share and to be free from unfair competition, based on its reliance on the moratorium that it claims should prevent Safety 4th's relocation to Fayette County. These asserted rights are

> insufficient to grant standing to Ohio Pyro. (App. 14).

In support of this conclusion, the Ohio Supreme Court cited nothing whatsoever. This holding, like its conclusion that Ohio Pyro is bound by the prior consent degree due to its "representation" by the State Fire Marshal, also violates the Due Process Clause of the Fourteenth Amendment by failing to recognize that Ohio Pyro's interest in enforcement of the moratorium is a property right protected by procedural due process standards. A state court may not deny due process by refusing to recognize the standing of a party to protect its rights.

Notwithstanding that the issue of whether one has a property interest protected by procedural due process has state-law underpinnings, the question "is ultimately one of federal constitutional law." *Town of Castle Rock v. Gonzalez,* 545 U.S. 748, 757 (2005). "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). "Resolution of the federal issue begins, however, with a determination of what it is that state law provides." *Town of Castle Rock,* 545 U.S. at 757.

As this Court explained in *Roth*, 408 U.S. 564 (1972), "the Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests – property interests – may take many forms." This Court went on to note that a property interest requires "a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." *Roth*, 408 U.S. 576.

Of course, the Constitution itself does not create the property interest it protects. "Rather," as *Roth* points out, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577.

This Court has "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 571-572. The "types of interests protected as 'property' are varied and, as often as not, intangible, 'relating to the whole domain of social and economic fact.'" *Logan v. Zimmerman*

Brush Co., 455 U.S. 422, 430 (1982).[4] "'[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.'" *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (citations omitted).

Ohio Pyro's property interest arises from laws enacted by the Ohio Legislature. Specifically, Ohio Rev. Code § 3743.75, which has existed in some form for more than twenty years, expressly *prohibits* the Fire Marshal from issuing new licenses or approving "the transfer of a license as a manufacturer or wholesaler of fireworks issued under this chapter to any location other than a location for which a license was issued under this chapter immediately prior to the effective date of this section." No discretion is left to the Fire Marshal to determine if transfer is appropriate. Where state officials have no discretion to ignore a mandate of law, those who benefit from the mandate have a claim of entitlement to that benefit that is protected by procedural due process. This Court's cases such as *Town of Castle Rock v. Gonzales*, 545

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[4] *See also Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985) (government employment); *Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainer's license protected); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (utility services); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (disability benefits); *Goss v. Lopez*, 419 U.S. 565 (1975) (public education); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits).

U.S. 748 (2005), make abundantly clear the importance of this lack of discretion. In that case, the Court found that a wife had no protected property interest in a police restraining order against her husband because "a well established tradition of police discretion has long existed with apparently mandatory arrest statutes." *Id.* at 760. There is no similar tradition granting the Fire Marshal discretion to ignore a legislatively mandated moratorium in the settlement of claims. In fact, in stark contrast, the Ohio Revised Code specifically provides that the Fire Marshal's otherwise broad variance power does not extend to the provisions of the moratorium. Ohio Rev. Code § 3743.75.

The state's guarantee through the moratorium that no new licenses would be issued and no existing licenses will be transferred outside of the current geographical area creates significant value in Ohio Pyro's property in terms of revenues, profits, and market share. By not allowing Ohio Pyro to litigate this property interest, its Fourteenth Amendment Due Process rights have been violated.

Significantly, Ohio Pyro does not question that the state legislature may choose to lift the moratorium at any time that it deems appropriate. Ohio Pyro does not claim that this would destroy any property interest. Rather, its argument below and here is only that Ohio Pyro is entitled to the property value that it enjoys while the moratorium remains in place. It also claims that it cannot, consistent with federal due process, be denied the opportunity to

protect that right when, as here, a state official fails to enforce that state law.

Ohio Pyro plainly has standing to assert its rights in this Court since the requirements of Article III standing, as expressed in *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), are easily met. The *Lujan* decision held:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560 (internal citations and quotations omitted).

Ohio Pyro's interest is without dispute legally protected by the existence of the moratorium. From the licensees perspective, although preventing licensees from relocating their own licenses to more commercially advantageous locations outside of their municipalities or townships, the moratorium at least

shields licensees from entry by competitors into their territories until such time as the legislature decides to lift the moratorium and allow all licensees to compete or relocate freely and equally. In effect, the legislature has granted Ohio Pyro, and other licensees, the sole right to sell fireworks where it holds its license. This type of regulatory scheme gives those affected by it a legally protected interest.

As the trial court record indicates, and as the trial court found, the injury here is concrete, particularized, and imminent – the transfer of the licenses will be directly injurious to Ohio Pyro's business through the introduction of geographic competition it would not otherwise face. The causal connection to the injury is equally apparent, as the transfer of the licenses would diminish the value of Ohio Pyro's property and business in Fayette County and elsewhere. The injury is directly traceable to the challenged action of the Fire Marshal in failing to enforce and respect the statutory moratorium. Finally, vacating the Ohio Supreme Court's decision and reinstating the injunction will redress Ohio Pyro's injury as it was before the Ohio Supreme Court's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 31, 2007.

Respectfully submitted,

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SUPREME COURT OF OHIO

OHIO PYRO, INC., ET AL., APPELLEES, *v.* OHIO DEPARTMENT OF COMMERCE, DIVISION OF STATE FIRE MARSHAL, ET AL., APPELLANTS.

[Cite as *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024.]

Collateral attack – Prior judgment entered in different court – Attack did not claim that prior judgment issued without jurisdiction or as product of fraudulent conduct.

(No. 2006-0785 – Submitted May 2, 2007 – Decided October 3, 2007.)
Appeal from the Court of Appeals for Fayette County, Nos. CA2005-03-009 and CA2005-03-011, 2006-Ohio 1002.

O'CONNOR, J.

{¶ 1} This appeal implicates the "collateral attack" doctrine, which disfavors the authority of one court to revisit a judgment of another court, in another proceeding, in other than very limited circumstances. For the reasons that follow, we determine that this case amounts to an impermissible collateral attack on a prior valid judgment. We reverse the judgment of the court of appeals.

Relevant Background

{¶ 2} On June 27, 1997, defendant-appellant Safety 4th Fireworks, Inc. ("Safety 4th")[1] faxed an application letter to defendant-appellant, Ohio Department of Commerce, Division of State Fire Marshal ("Fire Marshal"), seeking permission to relocate three of its wholesale fireworks licenses. As a branch of the state's Department of Commerce, the Fire Marshal strictly regulates the fireworks industry in Ohio under the authority of R.C. 3737.22(A)(14), principally through administration and enforcement of the provisions of R.C. Chapter 3743. Fireworks wholesalers operate under annual licenses issued by the Fire Marshal. In order to obtain a license, or to relocate a particular license, a wholesaler must obtain the permission of the Fire Marshal and must comply with all relevant statutory and additional requirements.

{¶ 3} After the Fire Marshal failed to approve Safety 4th's relocation request, Safety 4th sued the Fire Marshal in 1999 in the Jefferson County Court of Common Pleas. The key point of dispute concerned a moratorium on requests for the issuance of wholesaler licenses, which had been in effect in some form since the mid-1980s. Prior to 2001, the moratorium was contained in legislation that was never codified

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[1] The application indicated that Safety 4th was doing business under a number of names, including as defendant-appellant Liberty Fireworks, Inc. We use "Safety 4th" to refer to both Safety 4th and Liberty Fireworks.

in the Revised Code. *See, e.g.,* Section 29, Sub.H.B. No. 670, 146 Ohio Laws, Part IV, 6440, 6866, effective December 2, 1996; Section 165, Am.Sub.H.B. No. 215, 147 Ohio Laws, Part I, 909, 2197, effective June 30, 1997; Section 4, Sub.H.B. No. 204, 148 Ohio Laws, Part I, 1338, 1341, effective November 16, 1999. This moratorium has since been codified at R.C. 3743.75. *See* Sub.H.B. No. 161, 149 Ohio Laws, Part III, 5758, 5821-5822, effective June 29, 2001.

{¶ 4} In the 1999 lawsuit, Safety 4th in essence argued that a window existed in the moratorium allowing for the relocation of licenses prior to the effective date of Section 165 of Am.Sub.H.B. No. 215 (June 30, 1997), and that its application for relocation, dated June 27, 1997, preceded that date. Safety 4th sought a declaratory judgment that it was entitled to relocate licenses pursuant to the law that was in effect on June 27, 1997; a declaratory judgment that Am.Sub.H.B. No. 215 was unconstitutional for violating the one-subject rule of Section 15(D), Article II, of the Ohio Constitution; and a writ of mandamus to compel the Fire Marshal to approve the relocations.

{¶ 5} Several companies attempted to intervene in late 1999 in Safety 4th's Jefferson County action, but the trial court denied all motions to intervene. Among those that attempted to intervene was the plaintiff-appellee in the instant action, Ohio Pyro, Inc., a wholesale fireworks company and a competitor of Safety 4th. Ohio Pyro sought intervention in order to argue that moratorium restrictions applied to

Safety 4th's application. Ohio Pyro did not appeal from the denial of its motion for intervention.

{¶ 6} Safety 4th and the Fire Marshal eventually reached an agreement to settle the litigation. On June 6, 2001, the Jefferson County Court of Common Pleas journalized an agreed order submitted by the parties "as a full and final settlement of any and all claims." This order dismissed the complaint with prejudice. Paragraph 1 of the order provided, "Defendant will consider Plaintiffs' requests for transfer * * * to any political subdivision in the State of Ohio as if perfected on June 27, 1997 provided all provisions of this Agreed Order are met and further provided that there is compliance with all other applicable rules and regulations. * * * If, at the conclusion of such consideration, Defendant should find that all conditions and requirements have been met, then transfer shall be approved and deemed effective as of June 27, 1997."

{¶ 7} The order also specified a number of conditions Safety 4th was required to meet before approval would be granted, including compliance with all applicable laws and safety regulations (for example, regarding matters such as sprinkler systems, building codes, zoning, and setback requirements). The order also placed additional obligations on the Fire Marshal, such as conducting inspections and performing other duties relevant to the license transfer in a timely manner.

{¶ 8} Acting in reliance on the agreed order, Safety 4th selected a location in Fayette County, purchased real estate at the site, erected a building, and took other significant steps toward gaining final approval from the Fire Marshal regarding the new site.

{¶ 9} On April 7, 2004, Ohio Pyro initiated the present case by filing a complaint in the Fayette County Court of Common Pleas.[2] In its complaint, Ohio Pyro alleged that it had learned that Safety 4th was relocating to Fayette County, and that Ohio Pyro was pursuing injunctive relief as its "only opportunity" to preclude the Fire Marshal from approving that and other relocations. Ohio Pyro further alleged that in the 2001 settlement in Jefferson County, the Fire Marshal had "agreed to perform acts that are outside of his statutory authority" and that "contravene the express intent of Ohio's legislature."

{¶ 10} Ohio Pyro sought a declaratory judgment and preliminary and permanent injunctions to protect its market share as "the only company that is presently licensed to operate wholesale fireworks showrooms at any location in Fayette County," and requested that the court determine the "rights, status, and other legal relations" of and among Ohio

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[2] The trial court later granted the motion to intervene of another plaintiff, West Salem Fireworks, Inc. Because the interests of that party are identical to those of Ohio Pyro, we use "Ohio Pyro" to refer to both parties.

Pyro, the Fire Marshal, and Safety 4th. Ohio Pyro asserted that it relies on the fireworks moratorium to conduct its business and that it would suffer "diminished revenues, reduced profits, and lost market share" if another fireworks wholesaler were allowed to operate in Fayette County.

{¶ 11} On May 19, 2004, after a hearing that lasted several days, the Fayette County Court of Common Pleas granted Ohio Pyro's request for a preliminary injunction, restraining the Fire Marshal from approving the transfers of any licenses held by Safety 4th "'to any political subdivision in the state of Ohio * * * ' other than to another location within the political subdivision in which each license is currently located" pending further proceedings.

{¶ 12} In motions to dismiss, the Fire Marshal and Safety 4th[3] each argued that Ohio Pyro's suit conflicted with, and constituted an impermissible collateral attack on, the judgment that had been issued by the Jefferson County Court of Common Pleas in 2001, in which that court approved the settlement agreement entered into by the Fire Marshal and Safety 4th.

{¶ 13} Ohio Pyro later moved for summary judgment, and the Fire Marshal responded by filing a

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[3] Safety 4th was added as a defendant by an entry of the trial court dated May 24, 2004.

cross-motion for summary judgment.[4] On February 1, 2005, the trial court denied the motions to dismiss, with no specific explanation, and granted Ohio Pyro's motion for summary judgment. The court made permanent its earlier preliminary injunction on the same terms, forbidding the Fire Marshal from approving Safety 4th's relocation to Fayette County or to any other location not within the same political subdivision where each license was already located.[5]

{¶ 14} The Twelfth District Court of Appeals affirmed the judgment of the trial court, stating, "After reviewing the record, we cannot agree with appellants' position that the trial court's assumption of jurisdiction over the action seeking declaratory

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[4] Before the trial court ruled on the parties' summary judgment motions, the Jefferson County Court of Common Pleas, on November 12, 2004, issued an entry at Safety 4th's request specifically ordering the Fire Marshal to issue Safety 4th a license to operate at the Fayette County location. The Jefferson County Court of Common Pleas supported its ruling by stating that "this court has assumed jurisdiction to the exclusion of the Fayette County Common Pleas Court."

[5] After the trial court in this case issued its final decision and while the appeal was pending in the Twelfth District Court of Appeals, the Jefferson County Court of Common Pleas, on June 30, 2005, held the Fire Marshal in contempt for failing to approve the transfer to the Fayette County location and for failing to issue a license to Safety 4th to operate at that location, and imposed a fine for the contempt, with the fine stayed pending an appeal. The parties agree that that contempt order is currently on appeal to the Seventh District Court of Appeals, and that the appellate court has stayed its consideration pending the resolution by this court of the instant appeal.

judgment and injunctive relief constitutes a collateral attack on the Jefferson County judgment." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal,* Fayette App. Nos. CA2005-03-009 and CA2005-03-011, 2006-Ohio-1002, ¶ 13. Furthermore, the court of appeals held that an injunction was appropriate because Ohio Pyro had established irreparable harm and had no adequate remedy at law. *Id.* at ¶ 29. Finally, the court of appeals held that a justiciable controversy between the parties exists. *Id.* at ¶ 35.

{¶ 15} Both the Fire Marshal and Safety 4th appealed to this court, and we accepted jurisdiction to consider whether the trial court's decision in this case amounted to the endorsement of an improper collateral attack on a different court's previous judgment. 110 Ohio St.3d 1437, 2006-Ohio-3862, 852 N.E.2d 187.

Analysis

{¶ 16} This court has described a collateral attack as "'an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved.'" *Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 609, 611, 710 N.E.2d 681, quoting *Kingsborough v. Tousley* (1897), 56 Ohio St. 450, 458, 47 N.E. 541.

{¶ 17} Black's Law Dictionary (8th Ed.2004) 278 defines "collateral attack" as "[a]n attack on a judgment

in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective. A petition for a writ of habeas corpus is one type of collateral attack. – Also termed *indirect attack*. Cf. Direct Attack (1)."

{¶ 18} A "direct attack" is "[a]n attack on a judgment made in the same proceeding as the one in which the judgment was entered; specif., the taking of proceedings in the action in which a judgment has been rendered to have the judgment vacated or reversed or modified by appropriate proceedings in either the trial court or an appellate court. Examples of direct attacks are motions for new trial and appeals. Cf. Collateral Attack." Black's Law Dictionary (8th Ed.2004) 492.

{¶ 19} From the above definitions, it is apparent that a "collateral attack" is not inherently improper in and of itself, and that the collateral-attack doctrine does not necessarily forbid *all* collateral attacks. Rather, another way to characterize a collateral attack is simply as an indirect attack, to generally differentiate it as something other than a direct attack. The objective of a collateral attack is to modify a previous judgment because it is allegedly ineffective or flawed for some fundamental reason.

{¶ 20} Collateral attacks on judgments conceivably can be mounted in either the court that issued the judgment or in a different court, as they

involve any new "proceeding" not encompassed within the proceeding in which the original judgment was entered. Ohio's body of law recognizes certain specific types of actions that are sometimes pursued by criminal defendants (including habeas corpus proceedings and R.C. 2953.21 postconviction-relief proceedings) that fall within the definition of a collateral attack. *See, e.g., Pratts v. Hurley,* 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, syllabus (a habeas corpus action is a collateral attack); *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (a postconviction proceeding under R.C. 2953.21 is a collateral attack).

{¶ 21} In civil cases, a motion under Civ.R. 60(B) is one procedure available to a party (or a party's legal representative) to attempt to obtain relief from a final order or judgment in the issuing court. A proceeding under Civ.R. 60(B) technically falls within the definition of a collateral attack, but it is governed by the specific provisions of that rule. *See Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21, 520 N.E.2d 564 (Civ.R. 60(B) relief is appropriate when "the interests of justice demand the setting aside of a judgment normally accorded finality"); *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 1 O.O.3d 86, 351 N.E.2d 113, paragraph two of the syllabus.

{¶ 22} In our jurisprudence, there is a firm and longstanding principle that final judgments are meant to be just that – final. *See Kingsborough,* 56 Ohio St. at 458, 47 N.E. 541. Therefore, subject to

only rare exceptions, direct attacks, i.e., appeals, by parties to the litigation, are the primary way that a civil judgment is challenged. For these reasons, it necessarily follows that collateral or indirect attacks are disfavored and that they will succeed only in certain very limited situations. *See Coe v. Erb* (1898), 59 Ohio St. 259, 267-268, 52 N.E. 640.

{¶ 23} This court has determined that the reasons for disfavoring collateral attacks do not apply in two principal circumstances – when the issuing court lacked jurisdiction or when the order was the product of fraud (or of conduct in the nature of fraud). *See Coe,* 59 Ohio St. at 271, 52 N.E. 640 (strangers to a judgment are permitted to attack the judgment based on "fraud and want of jurisdiction"). *See, also, Lewis v. Reed* (1927), 117 Ohio St. 152, 159, 157 N.E. 897 (absent an invalid or void judgment or fraud in the procurement of the judgment, a valid judgment cannot be collaterally attacked). Ohio Pyro's action in Fayette County is not based on either of those two grounds. Therefore, unless other qualifying considerations are present, if this action is indeed a collateral attack on the 2001 judgment issued by the Jefferson County Court of Common Pleas, it is improper, and the trial court should have granted the motions to dismiss of the Fire Marshal and of Safety 4th.

{¶ 24} Although the 2001 judgment in Jefferson County was issued pursuant to the agreement of the parties to that litigation, it is nonetheless a valid judgment of the court. *See Gilbraith v. Hixson* (1987),

32 Ohio St.3d 127, 129, 512 N.E.2d 956 (a judgment entered by consent is "as effective as if the merits had been litigated" and is "just as enforceable as any other validly entered judgment"). Consequently, that judgment is entitled to the presumption of finality that the doctrine disfavoring collateral attacks affords to a valid judgment.

{¶ 25} In general, a collateral attack on a judgment is actually an attack on the *integrity* of the judgment. The merits of the previous judgment are not at issue in such a situation – only the fundamental validity of the previous judgment is at issue. Consequently, the collateral-attack doctrine contains elements of the same considerations that come into play when considering whether a particular judgment is void or voidable. *See Pratts,* 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 10-12. When a judgment was issued without jurisdiction or was procured by fraud, it is void and is subject to collateral attack. *See Coe,* 59 Ohio St. at 271, 52 N.E. 640. But in the absence of those fundamental deficiencies, a judgment is considered "valid" (even if it might perhaps have been flawed in its resolution of the merits of the case) and is generally not subject to collateral attack.

{¶ 26} Contrary to the holding of the court of appeals in this case, Ohio Pyro's action can be characterized no other way than as an impermissible collateral attack on the 2001 judgment entered by the Jefferson County Common Pleas Court. The Jefferson County 2001 judgment ordered the Fire Marshal to

allow Safety 4th to relocate its licenses, including the relocation of the license at issue in this case to Fayette County, provided all conditions for relocation were met. By asserting that the Fire Marshal should not be permitted to approve Safety 4th's relocation to Fayette County, Ohio Pyro seeks its own relief that directly conflicts with the terms of the Jefferson County judgment.

{¶ 27} There are significant limitations on the ability of a judgment to bind a nonparty. *See Coe,* 59 Ohio St. at 268-270, 52 N.E. 640. Therefore, an analysis of this case would be incomplete without examining Ohio Pyro's standing to assert the claims of its complaint as the basis for a collateral attack on the 2001 Jefferson County judgment. "Standing" is defined at its most basic as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary (8th Ed.2004) 1442. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088. "'[T]he question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy * * * " as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."'" *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, 64 O.O.2d 103, 298 N.E.2d 515, quoting *Sierra Club v.*

Morton (1972), 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636, quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663, and *Flast v. Cohen* (1968), 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947.

{¶ 28} The rights Ohio Pyro asserts in its complaint are the right to protect its market share and to be free from unfair competition, based on its reliance on the moratorium that it claims should prevent Safety 4th's relocation to Fayette County. These asserted rights are insufficient to grant standing to Ohio Pyro.

{¶ 29} Ohio Pyro argues that its action does not involve a "collateral attack" because it is merely attempting to vindicate its own rights. However, in this case, the economic interests Ohio Pyro seeks to advance are incapable of supporting its efforts to attack the 2001 Jefferson County judgment.

{¶ 30} The major purpose underlying the fireworks statutes and regulations is the protection of the public. Other than a vague reference in Ohio Pyro's complaint to risks to the public welfare, there is no indication that the 2001 judgment implicates concerns regarding endangerment of the public safety. That judgment expressly requires that all laws and regulations must be complied with before relocation will be permitted. This quite clearly is not the rare case in which exceptional circumstances are present that justify the allowance of a collateral

attack on a previous judgment in a court different from the one that issued the judgment.

{¶ 31} In light of the principles explained above, Ohio Pyro's arguments regarding the substantive terms of the 2001 Jefferson County judgment are not relevant to our inquiry. Nonetheless, we have reviewed the terms of the settlement agreement incorporated into that judgment entry and find no merit to Ohio Pyro's arguments that the settlement was inappropriate or "illegal," as Ohio Pyro alleges in its complaint.

{¶ 32} For our purposes, it is sufficient to recognize that the Jefferson County court had jurisdiction to issue the judgment that it did, and that the judgment was not the result of fraudulent conduct. Furthermore, Ohio Pyro's arguments that Paragraph 15 of the settlement indicates that the 2001 order did not intend to conferauthority on the Fire Marshal to approve the relocation (so that the moratorium can forbid the relocation) are explicitly contradicted by other clear provisions of the settlement – in particular paragraph 1 – concerning the moratorium that Ohio Pyro bases its claims on.

{¶ 33} Ohio Pyro moved to protect its specific business interests by attempting to intervene in the Jefferson County case in late 1999 and did not appeal the trial court's 2000 denial of intervention. Contrary to Ohio Pyro's argument, which is based in large part on res judicata principles, the fact that it was denied participation and thus was never a party in the

Jefferson County case is not relevant to its ability to collaterally attack that judgment in the instant case.

{¶ 34} The concept of res judicata is related in some respects to the collateral-attack doctrine. Res judicata principles can apply to prevent parties and those in privity with them from modifying or collaterally attacking a previous judgment. *See Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381-382, 653 N.E.2d 226. Because Ohio Pyro was not a party to the Jefferson County case, and is not in privity with any party that participated in that case, res judicata principles do not apply to its attempt to obtain relief in Fayette County.

{¶ 35} However, the collateral-attack doctrine also functions independently of res judicata principles. Although res judicata principles apply only to parties and those in privity with them, the collateral-attack doctrine applies to both parties and nonparties, contrary to Ohio Pyro's position that the collateral-attack doctrine cannot apply to a nonparty. *See Moor v. Parsons* (1918), 98 Ohio St. 233, 243, 120 N.E. 305 (an attack on a judgment "is collateral so far as it is sought to affect others than parties to the record"); *Plater v. Jefferson* (1956), 75 Ohio Law Abs. 68, 136 N.E.2d 111, 113 ("inasmuch as plaintiff has not * * * brought himself within that class of strangers who may properly collaterally attack a judgment, the trial court did not err when it * * * dismissed plaintiff's action"). The interests that Ohio Pyro asserts are insufficient to support its efforts to collaterally attack the Jefferson County judgment. Thus,

the principles disfavoring collateral attacks fully apply to Ohio Pyro's attempts in this case.

{¶ 36} Intervention provided Ohio Pyro with a potential opportunity to interject its interests into the Jefferson County case, but whether Ohio Pyro successfully asserted those interests at that time is not relevant to its ability to launch the instant collateral attack. Therefore, it is irrelevant to our discussion that Ohio Pyro did not appeal from the denial of its motion to intervene in that previous case, and it further does not matter for our purposes whether the trial court's decision to deny intervention was a final, appealable order.

Conclusion

{¶ 37} For the foregoing reasons, we hold that a collateral attack on a judgment issued by a different court in a civil case will succeed only when the first ruling was issued without jurisdiction or was the product of fraudulent conduct. Ohio Pyro's complaint does not challenge the fundamental validity of the 2001 Jefferson County judgment. Ohio Pyro's action fails because it asserts interests that are insufficient as a matter of law to overrule the judgment of the Jefferson County Court of Common Pleas. Consequently, Ohio Pyro has no standing to seek judicial enforcement of the rights it asserts.

{¶ 38} The motions to dismiss filed in this case by the Fire Marshal and by Safety 4th conclusively

demonstrate that Ohio Pyro's action is an impermissible collateralattack on a previous judgment. Therefore, Ohio Pyro's complaint does not state a valid claim, and the trial court should have dismissed the complaint.[6]

{¶ 39} We reverse the judgment of the court of appeals. This cause is remanded to the trial court for that court to enter an order dismissing the complaint.

Judgment reversed

and cause remanded.

MOYER, C.J., and LUNDBERG STRATTON, LANZINGER, and CUPP, JJ., concur.

PFEIFER, J., concurs in judgment only.

O'DONNELL, J., dissents.

O'DONNELL, J., dissenting.

{¶ 40} Respectfully, I dissent.

{¶ 41} The Jefferson County Common Pleas Court judgment is binding only upon the parties to that suit. When the state Fire Marshal settled that

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[6] Given our holding that the trial court should not have entertained Ohio Pyro's action because it is an improper collateral attack on the 2001 Jefferson County judgment, there is no need to address the second propositions of law raised by both the Fire Marshal and by Safety 4th, which question the propriety of injunctive relief in this case.

case and agreed to the court's entry of judgment, he bound himself to its terms. The court simply journalized the settlement agreement between those parties. The record before us, however, does not reflect whether the Attorney General was made a party to this litigation, which questioned, in part, the constitutionality of Am.Sub.H.B. 215, 147 Ohio Laws, Part I, 909, 2197.

{¶ 42} The peculiar problem here arises because the Fire Marshal must now choose whether to comply with the Jefferson County order to transfer Safety 4th's fireworks licenses, pursuant to his agreement to do so, or with the Fayette County order enjoining him from doing so; the Fire Marshal therefore will violate a court order no matter which course of action he follows. This conflict creates the question before us.

{¶ 43} Realizing that its pecuniary interests could be affected by a judgment in the Jefferson County Court of Common Pleas, Ohio Pyro filed a timely motion to intervene in that action, but the trial court disallowed the motion. In its ruling denying Ohio Pyro's motion, the Jefferson County court indicated that while Ohio Pyro claimed an interest in preventing Safety 4th from moving into an area where it would compete with Ohio Pyro, it had not alleged that Safety 4th was actually moving into that area.

{¶ 44} As a result of the Jefferson County settlement agreement and order, Safety 4th took significant steps toward relocating its fireworks licenses to

Fayette County by purchasing real estate and erecting a building. Ohio Pyro then filed this action in the Fayette County Court of Common Pleas to contest the impending transfer of Safety 4th's licenses, asserting a violation of R.C. 3743.75. The Fayette County Court of Common Pleas agreed with Ohio Pyro and prohibited the Fire Marshal from completing the transfer, and the Twelfth District Court of Appeals affirmed that judgment.

{¶ 45} The matter is now before this court on the question whether Ohio Pyro, a stranger to the Jefferson County action, has improperly levied a collateral attack on that court's order.

{¶ 46} Here, we find a litigant who actively sought to protect its legal rights by moving to intervene in the Jefferson County action and then by suing to prevent the transfer of the Safety 4th licenses to Fayette County. Today, a majority of this court tells Ohio Pyro that the action filed in Fayette County "amounts to an impermissible collateral attack on a prior valid judgment." Majority, at ¶ 1. This, in my view, misapplies the collateral-attack doctrine and sets a bad precedent for future litigants.

{¶ 47} This action did not constitute a collateral attack on the settlement between the Fire Marshal and Safety 4th, as nothing in that settlement specifically ordered transfer of the Safety 4th fireworks licenses to Fayette County – those transfers could have been to any of the 88 counties in Ohio, the vast majority of which would have posed no conflict for the

Fire Marshall and no harm to Ohio Pyro. In fact, the Jefferson County trial court stated in its entry denying intervention that the claimed interest of preventing a competitor from moving into an area where it could compete with an existing business was "so speculative that it cannot be seriously considered," and further opined that the interests of Ohio Pyro would be "adequately represented by the Ohio Department of Commerce who will vigorously defend the Fireworks Code as it now stands." It is now apparent that the Ohio Department of Commerce did not adequately represent Ohio Pyro's interests in the Jefferson County proceeding.

{¶ 48} Simply stated, the Fayette County action does not collaterally attack the Jefferson County Court of Common Pleas ruling. Inasmuch as Ohio Pyro had been denied the right to intervene in the Jefferson County case, it had no ability to appeal the judgment resulting from the settlement between the Fire Marshal and Safety 4th.

{¶ 49} Even assuming, arguendo, that Ohio Pyro's action is a collateral attack, I would not hold it to be an "impermissible" collateral attack. The United States Supreme Court has recognized that "'[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' *Hansberry v. Lee* (1940), 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22. * * * This rule is part of our 'deep-rooted historic tradition that

everyone should have his own day in court.' 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure [(1981) 417, Section 4449] * * * . A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks* (1989), 490 U.S. 755, 761-762, 109 S.Ct. 2180, 104 L.Ed.2d 835, superseded in part by Section 108 of the Civil Rights Act of 1991, codified at Section 2000e-2(n), Title 42, U.S. Code.

{¶ 50} As the court noted in *Plater v. Jefferson* (App. 1956), 75 Ohio Law. Abs. 68, 136 N.E.2d 111, strangers to a judgment may, in some cases, collaterally attack that judgment. The court in *Plater* held that "'[i]t is only those strangers who, if the judgment were given full credit and effect, *would be prejudiced in regard to some pre-existing right* that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, *they are by law allowed to impeach it whenever it is attempted to be enforced against them so as to effect* [sic] *rights or interests acquired prior to its rendition.*'" (Emphasis added and emphasis sic.) 75 Ohio Law.Abs. 68, 136 N.E.2d at 113, quoting 1 Freeman, A Treatise on the Law of Judgments (5th Ed.1925), 636-637, Section 319.

{¶ 51} Moreover, in determining that the denial of an insurer's motion to intervene did not constitute a final, appealable order, this court held: "When a party has sought and been denied intervention, collateral estoppel will not prohibit future litigation of

similar issues." *Gehm v. Timberline Post & Frame,* 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519, at paragraph two of the syllabus, construing *Howell v. Richardson* (1989), 45 Ohio St.3d 365, 544 N.E.2d 878.

{¶ 52} Ohio Pyro has done just that. It unsuccessfully sought to intervene in the action between Safety 4th and the Fire Marshall. Its business interest in the enforcement of the fireworks moratorium became ripe when Safety 4th attempted to transfer its licenses to Fayette County, where Ohio Pyro does business. Ohio Pyro then sued in Fayette County to protect its business interests, because it had been denied the right to do so in the Jefferson County action.

{¶ 53} The appellate court noted that "[i]t is not necessary to defeat or avoid the operation of the Jefferson County agreed settlement entry for the [Fayette County] trial court to address the issues brought forth in this action filed below." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal,* Fayette App. Nos. CA 2005-03-009 and CA 2005-03-011, 2006-Ohio-1002, ¶ 19. Even assuming this to be incorrect, I would still permit Ohio Pyro to proceed based upon my reading of *Gehm* and *Plater.* In either event, I would allow Ohio Pyro to maintain this action.

{¶ 54} I therefore concur with the conclusion reached by the appellate court. The grant of summary judgment was appropriate on the issues of irreparable harm and no adequate remedy at law, and on the

claim for declaratory relief, dismissal was not appropriate.

{¶ 55} Accordingly, I would affirm the judgment of the appellate court.

Bricker & Eckler, L.L.P., and T. Earl LeVere, for appellees.

Marc Dann, Attorney General, Elise Porter, Acting State Solicitor, Stephen P. Carney, Deputy Solicitor, and Hilary R. Damaser and Susan M. Sullivan, Assistant Solicitors, for appellant Ohio Department of Commerce, Division of State Fire Marshal.

Wiles, Boyle Burkholder & Bringardner, L.P.A., Michael L. Close, and Dale D. Cook; and W. Scott Simon, for appellants Safety 4th Fireworks, Inc., and Liberty Fireworks, Inc.

2006 WL 522457

Court of Appeals of Ohio, Twelfth District,
Fayette County.
OHIO PYRO, INC., et al., Plaintiffs-Appellees,
v.
OHIO DEPARTMENT OF COMMERCE,
DIVISION OF STATE FIRE MARSHAL, et al.,
Defendants-Appellants.
Nos. CA2005-03-009, CA2005-03-011.

Decided March 6, 2006.

Civil Appeal from Fayette County Court of Common Pleas, Case No.2004-142-CVH.

Bricker & Eckler LLP, T. Earl LeVere, Corey A. Goldsand, Columbus, for plaintiff-appellee. Ohio Pyro, Inc., and Raymond J. Grabow & Associates, Raymond J. Grabow, Independence, for intervenor plaintiff-appellee, West Salem Fireworks Co., Inc.

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., Michael L. Close, Dale D. Cook, Columbus, and W. Scott Simon, Columbus, for defendants-appellants, Safety 4th Fireworks, Inc. and Liberty Fireworks, Inc.

Jim Petro, Ohio Attorney General, Hilary R. Damaser, Executive Agencies Section, Reynoldsburg, for defendant-appellant, Ohio Department of Commerce, Division of State Fire Marshal.

POWELL, P.J.

{¶ 1} Defendants-appellants, Ohio Department of Commerce, Division of the State Fire Marshal

("SFM"), Safety 4th Fireworks, Inc., and Liberty Fireworks, Inc.,[1] appeal the decision by the Fayette County Court of Common Pleas to grant a permanent injunction and summary judgment to appellees, Ohio Pyro, Inc. and West Salem Fireworks Co., Inc., on a matter regarding the transfer of three wholesale fireworks licenses. Judgment is affirmed for the reasons outlined below.

{¶ 2} Ohio Pyro filed a complaint in Fayette County in 2004, asking for a declaration of rights and an order to enjoin the SFM from approving the geographic relocation or transfer of three specifically enumerated wholesale fireworks licenses as being contrary to law.[2] After taking evidence, the trial court issued a preliminary injunction prohibiting the SFM from approving the transfer of the three licenses.

{¶ 3} Appellees moved for summary judgment, and the SFM and Safety 4th filed motions to dismiss and cross-motions for summary judgment. The trial court denied the motions of Safety 4th and the SFM, granted appellees' motion for summary judgment, and issued a permanent injunction prohibiting the relocation of the three licenses.

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[1] For this appeal, we will refer to Safety 4th Fireworks, Inc. and Liberty Fireworks, Inc., collectively as "Safety 4th."

[2] Appellee West Salem Fireworks Co., Inc. later intervened in this case as a plaintiff and Safety 4th and Liberty Fireworks were named in the amended complaint as defendants.

{¶ 4} Both the SFM and Safety 4th appealed the trial court's decision. A review of the assignments of error presented by both appellants indicates that their arguments and assignments of error are the same and, therefore, will be discussed together in this consolidated appeal.

{¶ 5} The three assignments of error are couched in terms of error regarding the grant or denial of summary judgment and motions to dismiss. However, within that framework, the main thrust of appellants' challenge is the trial court's decision to hear this case and to grant a permanent injunction. We will address these challenges accordingly.

{¶ 6} First, we note that neither side disputes the requisite standards of review for summary judgment or for a motion to dismiss, and therefore, we will dispense with an extended discussion and apply the applicable standards as appropriate for summary judgment and motions to dismiss. *See* Civ.R. 56; Civ.R. 12(B)(6); *Towne v. Progressive Ins. Co.,* Butler App. No. CA2005-02-031, 2005-Ohio-7030, ¶ 7; *Springer v. Fitton Ctr. for Creative Arts,* Butler App. No. CA2004-06-128, 2005-Ohio-3624, ¶ 12.

{¶ 7} Under their first assignment of error, appellants argue that the action in Fayette County represented an improper collateral attack on a valid judgment of another common pleas court and, therefore, the trial court below had no jurisdiction to entertain such an action.

{¶ 8} In a discussion of the respective arguments, it is essential that we briefly identify the applicable statutory chapter and the other judgment to which appellants are referring when they argue that the trial court was permitting a collateral attack by hearing and deciding this case.

{¶ 9} Ohio Pyro relies upon R.C. Chapter 3743, the chapter that deals with fireworks licensing, for the proposition that the SFM is acting contrary to law by permitting the geographic transfer of the three licenses to other areas of the state because the applicable statutes allow no geographic transfers except those transfers within the same city or township where the license was previously located. *See* R.C. 3743.75 and R.C. 3743.17.

{¶ 10} Appellants argue that the SFM can approve the relocation of the three licenses outside the geographic limitations contained in the language of the fireworks statutes because the SFM and Safety 4th settled a lawsuit between them in the Jefferson County Court of Common Pleas by agreeing that the SFM would permit the three geographic license transfers to any political subdivision in Ohio, upon the performance of specific conditions. Under the agreement, if those conditions are met, the SFM would approve only the three license transfers to any area in the state as if all the requirements for the license transfers had been perfected when a variance to permit the transfer was, arguably, available. *See Safety 4th Fireworks, Inc. v. Ohio Department of*

Commerce, Division of State Fire Marshal (June 6, 2001), Jefferson C.P. No. 99-CV-275.

{¶ 11} An agreed entry of the settlement between Safety 4th and the SFM was signed and entered into the court's record by the Jefferson County Court of Common Pleas in June 2001. The entry also dismissed the complaint with prejudice.

{¶ 12} A collateral attack on a judgment may be defined as an attempt to avoid, defeat, or evade judgment, or to deny its force and effect, in some judicial proceeding not provided by law for the express purpose of reviewing it. *Hall v. Tucker,* 161 Ohio App.3d 245, 261, 2005-Ohio-2674, ¶ 42; *In re Guardianship of Titington* (P.C.1958), 82 Ohio Law Abs. 563.

{¶ 13} After reviewing the record, we cannot agree with appellants' position that the trial court's assumption of jurisdiction over the action seeking declaratory judgment and injunctive relief constitutes a collateral attack on the Jefferson County judgment.

{¶ 14} Despite requests to linger on the individual components of the Jefferson County agreed entry, we decline to do so. The Jefferson County agreed entry is an entry confirming a settlement between Safety 4th and the SFM. Other fireworks companies, including appellee Ohio Pyro, but not appellee West

Salem, attempted to intervene in the Jefferson County action, but were denied.[3]

{¶ 15} The Jefferson County judgment is referenced here simply because it indicates the SFM's intent to approve the geographic transfer of these three specific licenses.

{¶ 16} It appears that even the Jefferson County court anticipated, or rather, required other entities to seek their day in court elsewhere. The Jefferson County Common Pleas Court stated in its "Order Overruling Motions to Intervene" that one of the fireworks companies seeking to intervene would not be permitted to do so, but was "free to file its own case in [the county in which it did business]." In denying Ohio Pyro's attempt to intervene, the Jefferson County court stated that Ohio Pyro's interests were "so speculative that it cannot be seriously considered" because Ohio Pyro had not claimed that Safety 4th was actually moving into its territories.[4]

{¶ 17} In addition, we note that the Fourth District Court of Appeals found that a lower court in its district lacked jurisdiction to consider the matter in an action filed in Washington County by a

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[3] Ohio Pyro did not appeal the denial of their motion to intervene.

[4] In its 2000 entry, the Jefferson County court also found that the SFM would adequately represent the other fireworks companies by "vigorously defend[ing] the Fireworks Code as it now stands."

fireworks company that was attempting to stop the SFM from approving the geographic transfer of one of the fireworks licenses at issue. The Fourth Appellate District found that the claim was not ripe in the court below because there was no evidence at that time that Safety 4th was attempting to transfer a license to Washington County. *Eagle Fireworks, Inc. v. Ohio Department of Commerce,* Washington App. No. 03CA28, 2004-Ohio-509, appeal not allowed by 102 Ohio St.3d 1472, 2004-Ohio-2830.

{¶ 18} It is axiomatic that once the locations of the license transfers were identified, the issues set forth by Ohio Pyro and West Salem were ripe. The trial court in the case at bar had jurisdiction to hear the matter when steps were taken to build in Fayette County and other specific counties were identified as potential locations for the transfer of the other two fireworks licenses.[5]

{¶ 19} The trial court in Fayette County had jurisdiction to hear this case and apply state law. It is not necessary to defeat or avoid the operation of the Jefferson County agreed settlement entry for the trial court to address the issues brought forth in this action filed below.

{¶ 20} Keeping within the narrow focus of appellants' first assignment of error, under the applicable

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[5] The trial court heard evidence that the areas identified for relocation of the three licenses would impact either Ohio Pyro or West Salem, or both.

standards of review for summary judgment and motions to dismiss, we find that the trial court did not err when it assumed jurisdiction over the case filed in Fayette County. Accordingly, appellees' complaint stated a claim for relief, and construing the evidence most favorably for appellants, reasonable minds could come to but one conclusion and that conclusion is adverse to appellants. Summary judgment was appropriate and it was not error for the trial court to deny appellants' motions to dismiss or for summary judgment, and to grant summary judgment to Ohio Pyro and West Salem on the limited issue of jurisdiction. Appellants' combined first assignment of error is overruled.

{¶ 21} Appellants' second combined assignment of error asserts that the trial court erred in finding that appellees proved irreparable harm and no adequate remedy at law to receive injunctive relief.

{¶ 22} In order to obtain a permanent injunction, a party must show by clear and convincing evidence that immediate and irreparable injury, loss or damage will result to the applicant and that no adequate remedy at law exists. *Franklin Cty. Bd. of Health v. Paxson,* 152 Ohio App.3d 193, ¶ 25; *see, also,* Civ.R. 65.

{¶ 23} A court should exercise great caution regarding the granting of an injunction that would interfere with another branch of government and especially with the ability of the executive branch to enforce the law. *Garono v. State* (1988), 37 Ohio St.3d

171, 173 (injunction would be proper where the police are unwarranted in going beyond their authority or duty).

{¶ 24} Irreparable harm exists where there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete. *Crestmont Cadillac Corp. v. General Motors Corp.,* Cuyahoga App. No. 83000, 2004-Ohio-488, ¶ 36.

{¶ 25} In determining the propriety of injunctive relief, adequate remedy at law "means that the legal remedy must be as efficient as the indicated equitable remedy would be; that such legal remedy must be presently available in a single action; and that such remedy must be certain and complete." *Mid-America Tire, Inc. v. PTZ Trading Ltd.* 95 Ohio St.3d 367, 380, 2002-Ohio-2427, ¶ 81, quoting *Fuchs v. United Motor Stage Co., Inc.* (1939), 135 Ohio St. 509.

{¶ 26} While the grant or denial of an injunction is solely within the trial court's discretion, and we normally review that determination for an abuse of discretion, *Garano v. State,* 37 Ohio St. at 173, we are also mindful that this matter is before us on both a grant of summary judgment and permanent injunction. Therefore, we choose to proceed on the side of caution and review this matter de novo. *See Premier Health Care Services Inc. v. Schneiderman,* Montgomery App. No. 18795, 2001-Ohio-7087.

{¶ 27} During the hearing on the preliminary injunction, there was testimony that appellees could

lose a substantial number of customers and corresponding fireworks sales if Safety 4th was permitted to relocate its three licenses into the areas where appellees are located or where they draw their customer base. There was additional testimony that this loss of business could endanger the financial viability of appellees' applicable showrooms, which could have a detrimental impact on the businesses as a whole.

{¶ 28} An Ohio Pyro officer testified that competition is not unwelcomed, but the "playing field" is not level when Safety 4th is permitted to relocate three licenses to presumably favorable locations and no one else is permitted by the law in Chapter 3743 to do so.

{¶ 29} After reviewing the record under the applicable standards of review, we find that dismissal is not warranted and a grant of summary judgment to appellees is appropriate on the issue of irreparable harm to appellees and no adequate remedy at law. Further, reasonable minds could only conclude that irreparable harm is created and there is no other adequate remedy at law when a governmental agency like the state fire marshal manifests an intent to ignore state law and approve the geographic transfer of these three licenses beyond that permitted by law. *See Garano v. State,* 37 Ohio St.3d at 173 (injunction ordinarily employed to prevent a future wrong); R.C. 3743.75 and R.C. 3743.17; Civ.R. 65.

{¶ 30} Appellants' combined second assignment of error is overruled.

{¶ 31} And finally, under their third assignment of error, appellants argue that dismissal was appropriate and summary judgment should not have been granted because no justiciable controversy exists.

{¶ 32} To maintain an action for declaratory judgment, there must be a real controversy between the parties that is justiciable in character, and speedy relief is necessary to preserve the rights of the parties. *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97. For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties. *Tradesmen Intern., Inc. v. City of Massillon,* Stark App. No.2002CA00251, 2003-Ohio-2490, ¶ 32.

{¶ 33} Appellants argue that Ohio Pyro cannot create a controversy with the SFM by attacking the Jefferson County agreed entry when Ohio Pyro did not appeal the denial of their attempt to intervene in Jefferson County. Appellants further argue that no controversy exists because the Jefferson County agreed order places Safety 4th's application for the transfer of the three licenses within the time frame when it was permissible and therefore, the licenses existed at those three new locations before the law changed.

{¶ 34} We disagree with appellants' arguments concerning the lack of a justiciable controversy. Appellants continue to focus the attention of this case on the Jefferson County judgment by settlement.

Regardless of the intervention decisions in Jefferson County, neither Ohio Pyro nor West Salem was a party to that settlement agreement.

{¶ 35} A review of the record indicates that the instant case presents a real controversy between the parties that is ripe for judicial resolution and has a direct and immediate impact on the parties. The SFM indicated that it will approve the geographic relocation of three specific fireworks licenses when the applicable law does not permit it. *See, e.g., Shady Acres Nursing Home, Inc. v. Canary* (1973), 39 Ohio App.2d 47, 50 (license is frequently defined as permission to do some act without which the act would be illegal, but license is not a contract, nor does it constitute property in a constitutional sense; it does not confer an absolute right, and governmental authority can impose new burdens, create additional burdens, or revoke the license); *see, also, e.g., Scharff v. State Bd. of Liquor Control* (1955), 99 Ohio App. 139, 142, (there is no vested right in an application for a liquor permit and, therefore, the law in effect at the time of passing on the permit, rather than on the date of filing the application, governed the applicant's right to a permit); *Save the Lake v. Schregardus,* 141 Ohio App.3d 530, 538-539, 2001-Ohio-4377, appeal not allowed by 92 Ohio St.3d 1429, 2001-Ohio-4573; R.C. 3743.75; R.C. 3743.17.

{¶ 36} This case meets the requirements of a declaratory judgment action. Dismissal of the action was not appropriate. Construing the evidence most favorably for appellants, reasonable minds could

come to but one conclusion on this issue and that conclusion is adverse to appellants. Summary judgment for appellees is appropriate and the trial court did not err in finding a justiciable controversy exists. Appellants' motion to dismiss is, likewise, not well-taken.

{¶ 37} Appellants' combined third assignment of error is overruled.

{¶ 38} Judgment affirmed.

WALSH and BRESSLER, JJ., concur.

IN THE COURT OF COMMON PLEAS
FAYETTE COUNTY, OHIO

OHIO PYRO, INC.,	:	**Case No. 2004 142 CVH**
Plaintiff,	:	
	:	**Judge**
v.	:	**Victor D. Pontious, Jr.**
STATE OF OHIO, DEPARTMENT OF COMMERCE, Division of State Fire Marshal, et al.	:	
Defendants.	:	

Order Granting Plaintiff's Motion for Summary Judgment And Permanent Injunction

(Filed Feb. 1, 2005)

This cause came before the Court upon numerous motions including Plaintiff Ohio Pyro, Inc.'s Motion for Summary Judgment served on or about September 17, 2004. The Court has reviewed all of the parties' respective submissions on the pending motions and, based upon the arguments of counsel, the authorities presented, and for good cause shown, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff Ohio Pyro, Inc.'s motion for summary judgment is GRANTED in its entirety.

Additionally, IT IS HEREBY ORDERED AND ADJUDGED that Defendant State of Ohio, Department of Commerce, Div. of State Fire Marshal ("State

Fire Marshal"), his agents, employees and all persons acting for, with, by, through, or under him, and each of them, are hereby permanently enjoined and restrained from approving geographic transfers of wholesale fireworks license numbers 55-10-0001, 55-10-0002, and 55-34-0002 "to any political subdivision in the State of Ohio * * * " other than to another location within the political subdivision in which each license is currently located.

Each of the pending motions filed by the Defendant State Fire Marshal and those filed by Defendants Safety 4th Fireworks, Inc. and Liberty Fireworks, Inc. are hereby DENIED.

Within 30 days of the filing of this Order, the Court will refund the $23,000.00 bond posted by Plaintiff Ohio Pyro, Inc. on or about May 21, 2004.

Finally, the Court finds that there is no just cause for delay.

IT IS SO ORDERED.

ENTERED this 1 day of February 2005.

/s/ Victor Pontious
Judge Victor D. Pontious, Jr.

IN THE COURT OF COMMON PLEAS
JEFFERSON COUNTY, OHIO

Safety 4th Fireworks, Inc., d/b/a Country Fireworks, et al.,	**Case No. 99-CV-275**
	Judge
Plaintiffs,	**Joseph J. Bruzzese, Jr.**
vs.	**(Filed June 6, 2001)**
Ohio Department of Commerce, Division of State Fire Marshal,	
Defendant.	

AGREED ORDER

This matter is before the Court on Plaintiffs' Complaint filed July 8, 1999 ("Complaint") seeking the transfer of Plaintiffs' wholesale fireworks licenses and other relief. Plaintiffs Safety 4th Fireworks, Inc. dba Country Fireworks, Safety 4th Fireworks, Inc. dba Quality Fireworks and Novelty, and Liberty Fireworks, Inc. ("Plaintiffs") and Defendant Ohio Department of Commerce, Division of State Fire Marshal ("Defendant") agree that the following terms and conditions shall act as a full and final settlement of any and all claims that are presented or could have been presented in the Complaint:

1. Defendant will consider Plaintiffs' requests for transfer of license numbers 55-10-0001, 55-10-0002, and 55-34-002 to any political subdivision in the State of Ohio as if perfected on June 27, 1997 provided all provisions of this Agreed Order are

met and further provided that there is compliance with all other applicable rules and regulations. In determining whether the provisions of this Agreed Order and other applicable rules and regulations are met, Defendant will look at each request for transfer separate and apart from the other requests. If, at the conclusion of such consideration, Defendant should find that all conditions and requirements have been met, then transfer shall be approved and deemed effective as of June 27, 1997.

2. In the event that Defendant approves a transfer request in accordance with the provisions set forth herein, the Plaintiff that held the license at the former location will remain the holder of the license at the new location for at least one (1) calendar year after the new facility opens for business. This does not preclude Plaintiffs from selling or transferring said licenses thereafter pursuant to R.C. 3743.17(D).

3. Prior to any fireworks showroom and/or storage area construction, renovation, alteration or relocation or any other fireworks related activity on any proposed new license site, Plaintiffs will provide Defendant with a site location in writing, including a complete address and legal description, for each proposed new location. This information must be provided within three (3) years of the filing of this Agreed Order.

4. Prior to any fireworks showroom and/or storage area construction, renovation, alteration or relocation or any other fireworks related activity on any proposed new license site, and in accordance with Ohio R.C. §§ 3743.17 and 3743.25 and OFC

§§ 1301:7-7-31(M), (N) and (P), the Plaintiff must submit all construction and site plans to the Defendant for approval. No fireworks showroom and/or storage area construction, renovation, alteration or relocation or any other fireworks related activity on any proposed new license site may occur until the Defendant has received all of the supplemental information it requests (if any) following the plans submissions, a preliminary site inspection is completed and the Defendant grants approval for such activity. In addition to the requirements contained in the Ohio Revised Code, Ohio Fire Code and the Ohio Basic Building Code, all new showrooms or other areas on a wholesale licensed site to which the public may have access must be equipped with an approved fire suppression system with ESFR sprinkler heads. The parties further agree that if installation of the ESFR sprinkler heads costs in excess of Ten Thousand Dollars ($10,000.00) over the cost of a standard sprinkler system for a facility transferred hereunder, Plaintiffs shall be permitted to install any approved fire suppression system in that facility without ESFR sprinkler heads.

5. Plaintiffs must complete construction and obtain all inspections required by law within four (4) years of the filing of this Agreed Order.

6. Defendant must perform all inspections, obligations and any other duties relevant to the Plaintiffs' requested transfers and licensing in a reasonable and timely fashion.

7. In accordance with Ohio R.C. 3743.15 through 3743.25, the transfer of each license is conditioned

upon Defendant's granting a final approval of transfer for each new location. This approval can only occur only after the new locations pass a final inspection conducted by the Defendant and the Defendant is in receipt of the appropriate certificates of occupancy from the building official(s) having jurisdiction and the appropriate documentation outlining compliance with all applicable zoning and/or other local regulations as outlined in paragraph 11 of this agreement.

8. Plaintiffs agree to comply with, and Defendants approval is conditioned upon such compliance, all applicable public health and safety laws and regulations in effect on the date Defendant conducts the final inspection of each location referred to in paragraph 7 of this Agreed Order. Such public health and safety laws and regulations currently include, but are not limited to:

   a. the interlinked fire detection, fire suppression, smoke exhaust and smoke evacuation systems required by R.C. 3743.25 for each wholesale showroom;

   b. the fireworks storage, handling, packaging, display regulations contained in R.C. 3743 or OFC 1301: 7-7-31; and

   c. the security, maximum occupancy load, egress routes, mechanical construction, zoning, minimum separation distances or other requirements governing the construction or operation of a fireworks wholesale facility contained in R.C. 3743, OFC 1301: 7-7-31 or local laws, statutes and ordinances.

9. Plaintiffs shall comply with the following setback requirements for the new facilities: (a) no closer than one thousand (1,000) feet to any structure that does not belong to the licensee; (b) no closer than three hundred (300) feet to any highway or railroad; (c) no closer than one hundred (100) feet to any building used for the storage of explosives or fireworks by the licensee; (d) no closer than fifty (50) feet to any factory building owned or used by the licensee; and (e) no closer than two thousand (2,000) feet to any building used for the sale, storage, or manufacturing of fireworks that does not belong to the licensee.

10. In the event that the requested transfers are approved by Defendant in accordance with the provisions detailed herein, Plaintiffs' existing licenses will be transferred to the proposed new locations immediately upon the commencement of business at the new locations. Thereafter, Plaintiffs will no longer be permitted to operate any business relating to the fireworks industry, including the manufacture, wholesale or retail of fireworks, at the current sites.

11. The proposed new locations are also subject to all reviews, inspections and approvals required by all building and zoning authorities that have jurisdiction over each proposed new location.

12. Defendant enters into this settlement in order to resolve the pending litigation and based upon the unique facts and circumstances of the underlying dispute. No other person, company or entity is eligible for transfer based upon the criteria set

forth herein because no other person, company or entity is in the same factual situation as Plaintiffs.

13. This Agreed Order shall also resolve Jefferson County Common Pleas Case No. 00-CV-305 (*In the Matter of Revocation of 1999 Fireworks License: Safety 4th Fireworks, Inc. d/b/a Country Fireworks ID No. 55-10-0001 v. Ohio Department of Commerce, Division of State Fire Marshal*). Simultaneous to the execution of this Agreed Order, the parties shall execute the Agreed Order attached hereto and incorporated herein as Exhibit "A." Exhibit "A" will be filed in Case No. 00-CV-305 upon its execution.

14. Plaintiffs will execute the Release attached hereto and incorporated herein as Exhibit "B" within five (5) days of the filing of this Agreed Order.

15. Nothing in this Agreed Order negates any current or future duty or obligation imposed upon, or discretion granted to, Defendant by the laws of Ohio or the United States.

16. If any provision of this Agreed Order is not met within the time frames set forth herein, the transfer of the applicable license will be denied and the June 27, 1997 request for geographic transfer with respect to that license will be deemed not to have been made. Therefore, any future request for the geographic transfer of such a license will be considered under the then-existing laws and regulations.

17. Nothing in this Agreed Order will preclude Plaintiffs from requesting and/or being granted a variance pursuant to Ohio R.C. 3743.59 nor will it

preclude Plaintiffs from requesting and/or being granted an appeal pursuant to Ohio R.C. 3781.

18. This Agreed Order is not intended, nor shall it be treated, as an admission of liability or wrongdoing by Defendant with respect to any of the allegations in the Complaint, which allegations Defendant specifically denies.

19. The parties agree to equally split the court costs associated with this matter.

20. The Complaint is hereby dismissed with prejudice. Neither party will make any request for attorney's fees, expenses or costs of any type or nature, nor are they entitled to the same.

_____ /s/ Joseph Bruzzese
Date JUDGE
J. BRUZZESE, JR.

Approved By:

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IN THE COMMON PLEAS COURT
OF JEFFERSON COUNTY, OHIO

SAFETY 4TH FIRE-WORKS, INC. dba COUNTRY FIRE WORKS, ET. AL.	)	**ORDER OVERRULING MOTIONS TO INTERVENE**
Plaintiffs	)	(Filed Jan. 5, 2000)
-vs-	)	Case No: 99-CV-275
OHIO DEPARTMENT OF COMMERCE DIVISION OF STATE FIRE MARSHAL, ET. AL.	)	**JUDGE JOSEPH J. BRUZZESE, JR.**
Defendants	)	

* * * * * * * *

1. On November 3, 1999 Springfield Fireworks, Inc. filed its Motion to Intervene.

2. Also, on November 3, 1999 the Court erroneously granted Springfield's Motion to Intervene without any notice to Plaintiffs.

3. On December 3, 1999 the related companies of B. J. Alan Company, Inc., Rozzi, Inc., Hamburg Fireworks Display, Inc., American Fireworks Co., Ohio Pyro, Inc. and Eagle Fireworks, Inc. all filed their Motion to Intervene.

4. On December 13, 1999 hearing was held on both Motions to Intervene and the parties were

granted additional time within which to file supplemental briefs.

DISCUSSION

Plaintiff is a fireworks manufacturer and dealer licensed under the laws of Ohio. Plaintiff seeks to move its operation to a location outside of the original municipality or township in which it was located. Certain provisions of the fireworks code prohibit moving a fireworks operation to a location outside of its original municipality or township. In essence, Plaintiff's complaint challenges the constitutionality of those provisions in an attempt to move its operation across a municipal or township line.

Springfield previously attempted such a move, was denied, and never appealed the denial. In that regard, its circumstances differ from those of the Plaintiff and would add new factual and legal issues to this case.

The B. J. Alan Companies seek to intervene on behalf of Defendant to uphold the relocation restrictions in the fireworks code. It has demonstrated no interest in this case other than the general interest that all citizens may have to preserve the laws of the State. They claim a particular interest simply because they are competitors of Plaintiffs and they allege this status alone gives them the right to intervene as a matter of right. Under their interpretation of Civil Rule 24 all competitors of any business would always have the absolute right to intervene in any

case where any part of the statutory or regulatory controls of an industry are challenged.

None of the proposed intervenors have any direct interest in this case. Springfield is located in Putnam County, Ohio, eight counties away and in the Northwest corner of the state in a different Federal Court District and in a different Ohio Appellate District. It has also requested and been denied permission to move and has not appealed that denial. Because this case is all about geographical location and moving geographical locations it would seem that Springfield and Plaintiffs have little, if anything, in common. Further, Springfield is free to file its own case in Putnam County and is not affected by Plaintiff's action.

The B. J. Alan Companies have less interest in this case than Springfield. Its sole claimed interest is to prevent Plaintiff from moving into an area where it can compete with one of the B. J. Alan Companies but, it does not claim that Plaintiff is actually moving into such a territory. Its alleged interest is so speculative that it cannot be seriously considered.

Further, the B. J. Alan Companies are adequately represented by the Ohio Department of Commerce who will vigorously defend the Fireworks Code as it now stands. Although the B. J. Alan Companies claim that they are not adequately represented they then go on to make this interesting statement at page 8 of their December 22, 1999 brief:

> "Plaintiffs argue that 'granting the Motion to Intervene would, in affect, throw open the Courthouse doors.' Memorandum in Opposition at page 4. This, however, is simply not true.
>
> If the Court grants the Motion to Intervene, Plaintiffs' other competitors will not be able to intervene in this action. If the Motion to Intervene is granted, the intervenors will adequately represent Plaintiffs other competitors. Therefore, granting the Motion to Intervene will not unduly open the Courthouse doors."

The B. J. Alan Companies fail to explain why they can represent the interests of all of Plaintiffs other competitors while the Department of Commerce cannot. Further, this Court is reluctant to allow multiple direct competitors to intervene in a case where discovery could potentially be used as a tool to pry into a competitor's internal and economic affairs under the guise of legitimate discovery. The risk of encountering such abuse should not be incurred without some showing of a legitimate and real interest of intervenors to be protected.

WHEREFORE, both Motions for Leave to Intervene are overruled as to Springfield and as to the B. J. Alan Companies.

/s Joseph Bruzzese
JUDGE
JOSEPH J. BRUZZESE, JR.

Copies to:

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W. Howard Klatt, Attorney
Barbara A. Serve, Assistant Attorney General
Susan K. Pritchard, Attorney